

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 43630/2019

DOH: 12 June 2025

DECIDED: 22 July 2025

1. REPORTABLE: **NO**/YES
2. OF INTEREST TO OTHER JUDGES: **NO**/YES

3. REVISED.

DATE 22 July 2025

SIGNATURE

In the matter of:

L[...] M[...] obo

Plaintiff / Respondent

L[...] and L[...] M[...]

and

ROAD ACCIDENT FUND

Defendant / Applicant

This judgment has been handed down remotely and shall be circulated to the parties by way of email / uploading on Caselines. The date of hand down shall be deemed to be 22 July 2025.

ORDER

1. The application to strike out is dismissed. The Fund must pay the respondent's. Such costs to include the costs of two counsel.
 2. The respondent must file an affidavit dealing with the new matter in the applicant's replying affidavit within twenty [20] days from date of this order.
 3. The application in terms of Rule 30(2) is upheld with costs, such costs to include the costs of two counsel.
-

JUDGMENT

Bam J

A. Introduction

1. Before this court are two interlocutory applications, brought by the Respondent. They are, the application to strike out certain paragraphs from the applicant's replying affidavit and, the application to set aside the Supplementary Notice of Motion filed by the applicant on 21 June 2024. The respondent contends that the Supplementary Notice of Motion, which essentially amends the initial Notice of Motion, ignored her right to object to the amendment and on that basis is prejudicial to her interests. As to the content that must be struck out from the applicant's affidavit, the respondent contends it is scandalous, vexatious and irrelevant. The applicant contends that neither application carries merit; they should be dismissed.
2. The two applications were initially brought together with the main application for rescission. Based on a directive issued by this court on the day of the hearing, only the two interlocutory motions proceeded. The application for rescission was held back, based on the undertaking of prompt delivery of the outcome of the two interlocutory applications. I commence by introducing the parties before sketching out the context in which the two applications arise.

3. The applicant is the Road Accident Fund, a statutory body established in terms of Section 2(1) of the Road Accident Fund Act 56 of 1996, as amended, with its principal place of business at 3[...] I[...] P[...], Menlo Park, Pretoria, Gauteng. The applicant was the defendant in the original proceedings pertaining to the claim lodged by the respondent. The respondent is an adult female educator. She launched the initial proceedings in her personal and representative capacity as the biological mother and parent of the two minor children, L[...], born 17 June 2011 and L[...] born on 6 June 2015.

Background

4. The issues to be decided can only be appreciated with this background in mind: On 23 April 2024 the Road Accident Fund, (the Fund) launched a motion in terms of Rule 42(1) (a), alternatively common law, to rescind the order granted by this court per Pienaar AJ on 29 September 2023. The Fund contends the order was erroneously sought and granted in its absence. As to how the order arose, the record suggests that the respondent lodged a claim for loss of support, in the amount of R 2 951 250, following the demise of her husband and father of the minor children, on 19 May 2017, as a result of a motor vehicle accident. On 15 February 2019, the Fund sent the respondent's attorneys an offer wherein they stated their view that the deceased was the sole cause of the accident.
5. In 2022, the respondent launched proceedings to compel the Fund to furnish further particulars in terms of Rule 21 and a date for a pretrial conference. The matter came before Nyathi J, on 20 July 2022. The learned Judge issued the following order:
The Respondent must, within 10 calendar days of service of the of the order by email attend to the following:
 - 1.1 Comply with Rule 21 for Further Particulars
 - 1.2 Contact the Applicant's attorney and arrange a mutually convenient pre-trial conference.

2. Should the respondent fail to comply with paragraph 1, the respondent's defence be struck out and it is ordered that the Respondent is liable for 100% of the Applicant's proven or agreed damages.
 3. The Applicant's attorney may approach the registrar for a date on the default judgment roll.
 4. The Respondent must pay the Applicant's Taxed attorney and client costs, including counsel's day fee for 20 July 2022.
6. Armed with the order, the respondent proceeded to the default judgment court for quantification of her claim. On 29 September 2023, the court per Pienaar AJ awarded the respondent damages on the basis of the order of 20 July 2022, in the amount of R 2 135 218, in full and final settlement of her claim. Following the Fund's application to rescind only the judgment granted by Pienaar AJ, the respondent in her answering affidavit, filed during May 2024, took a point in *limine* to the effect that the failure to rescind the first order granted by Nyathi J is fatal to the rescission application.
7. Having been alerted to their omission, the Fund in its replying affidavit, filed on 21 June, indicated that it would seek leave to file further supplementary papers to address the defect. It further included various paragraphs dealing with the rescission of Nyathi J's order. I interpose that this was not the first time the Fund made statements about rescinding the Nyathi J order. It had done so in its founding papers. In the replying affidavit however, it exerted effort in building its case on the issue. The Fund further sought condonation for failing to comply with the order.
8. Simultaneously, the Fund filed what it referred to as a Supplementary Notice of Motion, in effect, an amendment of the original Notice of Motion filed on 23 April 2023, indicating that it sought to rescind both the Pienaar AJ and Nyathi J orders. The new content in the replying affidavit and the Supplementary Notice of Motion were met with the respondent's notice to strike out, as provided for in Rule 6(15), and a notice to remove an irregular matter, in terms of Rule 30(1), respectively.

9. The two notices were followed by the present applications. With the application to strike out, the respondent seeks a striking down of all references to rescinding the Nyathi J order in the replying affidavit, on the basis that she was prejudiced and that the content constitutes scandalous, vexatious and irrelevant matter. The respondent further seeks the removal of the Amended Notice of Motion as an irregular step. Here too, she contends she was not afforded the opportunity to object to the amendment prior to it being effected. I now deal with the parties' submissions per application.

Application to strike out - Rule 6 (15)

10. The main thread running through the respondent's submissions regarding the rescission of the Nyathi J order is that she has been prejudiced, in that she was denied the opportunity to address the new case. She goes further and submits that all such references dealing with the rescission of the Nyathi J order must be struck out on the basis that they are scandalous, vexatious, and irrelevant. The applicant states that it is plain from the founding papers that it had intended to rescind the Nyathi J order. It draws this court's attention to the relevant paragraphs where it demonstrates why the order must be rescinded.

11. It is trite that an applicant must make their case in the founding affidavit for that is the case which the respondent is called upon to either affirm or deny.¹ The respondent is given one opportunity only to deal with the applicant's cause of action and present evidence in opposition in the answering affidavit.² The Fund conceded the prejudice to the respondent. To mitigate the prejudice, they tendered costs and prayed for an order that the respondent be afforded an opportunity to respond to the relevant averments in the replying affidavit. The concession was appropriately made.

¹ *Director of Hospital Services v Mistry* (272/77) [1978] ZASCA 126 (9 November 1978).

² *Gold Fields Limited and Others v Motley Rice LLC*, In re: *Nkala v Harmony Gold Mining Company Limited and Others* (48226/12) [2015] ZAGPJHC 62; 2015 (4) SA 299 (GJ); [2015] 2 All SA 686 (GJ) (19 March 2015), paragraph 122

12. Where I have difficulty with the respondent's submissions is with her contestation that the case dealing with the rescission of the Nyathi J order be struck out. The principles governing applications to strike out are encapsulated in *Helen Suzman Foundation v President of the Republic of South Africa and Others*; *Glenister v President of the Republic of South Africa and Others*, where the court described scandalous, vexatious, and irrelevant allegations thus:

'Scandalous' allegations are those which may or may not be relevant but which are so worded as to be abusive or defamatory; a "vexatious" matter refers to allegations which may or may not be relevant but are so worded as to convey an intention to harass or annoy; and "irrelevant" allegations do not apply to the matter in hand and do not contribute one way or the other to a decision of that matter. The test for determining relevance is whether the evidence objected to is relevant to an issue in the litigation.³

13. It would be a stretch for this court to find that the averments aimed at rescinding the Nyathi J order are scandalous, vexatious, and irrelevant. They are nothing of that sort. In fact, the respondent did not even try to apply the test set by the Constitutional Court in *Helen Suzman*⁴. In addition to this, the law is clear that two requirements must be met before a striking out application can succeed. They are:

- '(i) the matter sought to be struck out must indeed be scandalous, vexatious or irrelevant; and,
- (ii) the court must be satisfied that if such a matter is not struck out, the party seeking such relief would be prejudiced.'⁵

³ (CCT 07/14, CCT 09/14) [2014] ZACC 32; 2015 (1) BCLR 1 (CC); 2015 (2) SA 1 (CC) (27 November 2014), paragraph 27.

⁴ See paragraph 12 of this judgment.

⁵ *Beinash v Wixley* (457/95) [1997] ZASCA 32; 1997 (3) SA 721 (SCA); [1997] 2 All SA 241 (A); (27 March 1997), at p 24; *Lawyers for Human Rights v Minister in the Presidency and Others* (CCT120/16) [2016] ZACC 45; 2017 (1) SA 645 (CC); 2017 (4) BCLR 445 (CC) (1 December 2016), paragraph 19; *Gordhan and Others v Public Protector and Others* (36099/2098) [2020] ZAGPPHC 777 (17 December 2020), paragraph 61.

14. On the meaning of prejudice, the court in *Gordhan and Others v Public Protector and Others*, said:

‘The phrase ‘prejudice to the applicant’s case’ clearly does not mean that, if the offending allegations remain, the innocent party’s chances of success will be reduced. It is substantially less than that.... If a party is required to deal with scandalous or irrelevant matter the main issue could be side-tracked but if such matter is left unanswered the innocent party may well be defamed. The retention of such matter would therefore be prejudicial to the innocent party.’⁶

15. Coming to the facts of this case, sight cannot be lost of the fact that the Fund had made its intentions clear in the founding affidavit that the Nyathi J order is to be rescinded, because of what it calls, the irregularities surrounding it. In tracing the root cause, the Fund began by tracing the notice filed by the respondent in April 2021, requesting further particulars for trial and dates for a pre-trial conference. That notice indicated that failure to respond within 10 days would lead to an application to strike out the Fund’s defence. But, as the facts show, no such application was ever brought. Instead, in one sweep, the respondent ended up with an award for damages, without having to deal with merits, even though these were in issue, because this was a driver claim.

16. All of this was made possible by the first order of 20 July 2022, submits the Fund, because it not only struck out the Fund’s defence, but it awarded 100% liability in favour of the respondent. Thus, when the respondent reached Pienaar AJ’s court, the learned Judge did not have to deal with merits. The Fund concludes that in light of the irregularities surrounding the order of 20 July 2022 order, it ought to be rescinded. The respondent makes light of the issues surrounding the Nyathi J order. She says, even if the order of 20 July was erroneously granted, that issue is irrelevant. I will return on the appropriate remedy after addressing the application in terms of Rule 30(2).

⁶ (36099/2098) [2020] ZAGPPHC 777 (17 December), paragraph 62.

Irregular matter - Rule 30(2)

17. The main complaint here is that the Fund did not follow Rule 28. It did not give the respondent notice of its intention to amend the relief it would seek and allow her the opportunity to object. It simply amended its Notice of Motion and filed it as a Supplementary Notice of Motion. In *African Amity NPC and Others v Minister of Home Affairs and Others*⁷, a decision of the Full Court of this division, the court had to deal with a similar case of a party who amended their notice of motion without affording the other side the notice prescribed in Rule 28(1). The affected party objected to the amendments anyway, stating clearly and concisely their grounds for objection as provided for in Rule 28(3). The issue was whether a Notice of Motion may be amended as provided for in Rule 28(1).

18. Rule 28 (1) of the Uniform Rules reads:

‘28. Amendment of pleadings and documents

(1) Any party desiring to amend a pleading or document other than a sworn statement, filed in connection with any proceedings, shall notify all other parties of his intention to amend and shall furnish particulars of the amendment.’

19. The court in *Amity*, after surveying several authorities, concluded that Rule 28(1) excluded only sworn statements from amendments, highlighting that a Notice of Motion is not a sworn statement. The practical rule on amendments is espoused by the Constitutional Court in *Affordable Medicines Trust and Others v Minister of Health and Another*:

‘...The practical rule that emerges from these cases is that amendments will always be allowed unless the amendment is mala fide (made in bad faith) or unless the amendment will cause an injustice to the other side which cannot be cured by an appropriate order for costs, or “unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleading

⁷ [2023] ZAGPPHC 503; 51735/2021 (29 June 2023).

which it is sought to amend was filed.” These principles apply equally to a Notice of Motion. The question in each case, therefore, is what do the interests of justice demand.’⁸

20. It follows that the applicant’s contention that it cannot amend a Notice of Motion must fail. The Fund should have followed the provisions of Rule 28.

Appropriate relief

21. The applicant accepts the prejudice to the respondent, for which it has tendered costs. This means, the respondent must be afforded the opportunity to file a further affidavit dealing with the averments aimed at the Nyathi J order in the replying affidavit. The proper cause to follow in amending any document or pleading is Rule 28. Accordingly, the Supplementary Notice of Motion is set aside as an irregular step. The applicant must file a notice to amend as provided in the Rules. The application to strike out fails. Having said this, this is one of those instances where the results should not determine the costs. It would not be in the interests of justice to call upon the applicant to pay costs.

B. Order

1. The application to strike out is dismissed. The Fund must pay the respondent’s. Such costs to include the costs of two counsel.
2. The respondent must file an affidavit dealing with the new matter in the applicant’s replying affidavit within twenty [20] days from date of this order.
3. The application in terms of Rule 30(2) is upheld with costs, such costs to include the costs of two counsel.

N.N BAM (Ms)

JUDGE OF THE HIGH COURT,

⁸ (CCT27/04) [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) (11 March 2005), paragraph 9.

**GAUTENG DIVISION,
PRETORIA**

Date of Hearing: 12 June 2025

Date of Judgment: 22 July 2025

Appearances:

Counsel for Plaintiff / Respondent: Adv B Geach SC with Adv
F.H.H Kehrhahn

Instructed by: Mdusulwana Attorneys Inc
Hatfield, Pretoria

Counsel for Defendant / Applicant: Adv V Notshe SC with Adv T
Mlambo

Instructed by: Madiba Incorporated
Brooklyn, Pretoria